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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE HENRY GAGE, Defendant and Appellant.	B168825 (Super. Ct. No. MA 017774)

APPEAL from an order of the Superior Court of Los Angeles County. Carol S. Koppel and Martin L. Herscovitz, Judges. Affirmed in part and modified in part.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Adrian Tigmo, Deputy Attorney General, for Plaintiff and Respondent.

George Henry Gage appeals his conviction, after a jury trial, of one count of continuous sexual abuse in violation of Penal Code[1] section 288.5, subdivision (a), nine counts of forcible rape in violation of section 261, subdivision (a)(2), and nine counts of lewd acts with a child under 14 in violation of section 288, subdivision (a). We order that the abstract of judgment be corrected to reflect the trial court's oral pronouncement, and in all other respects affirm the judgment.

FACTS

We recite the facts of this case as recounted in our prior opinion in *People v. Gage*, Case No. B147219, filed on November 14, 2001: Defendant and Wanda Gage were married in 1990, when Wanda's daughter, Marian, was in kindergarten. The couple had lived together with Wanda's two children, Marian and Lionel B., for three years before their marriage. Both children treated defendant as their father and referred to him as "daddy."

In 1993, the family moved from Texas to Palmdale, where they lived for a period of approximately 18 months. During that period of time, defendant regularly sexually abused Marian. These acts of abuse usually consisted of penile penetration of Marian's vagina, followed by ejaculation on Marian's clothes. Sometimes defendant touched or sucked Marian's breasts or put his penis on her buttocks. The abuse usually occurred in Marian's bedroom, when her mother and brother were not home. Typically, Marian would be on her back and defendant would move her underpants to one side and penetrate her.

When Marian was in the sixth grade at Ocotillo Elementary School, the abuse occurred once a week. When she attended Antelope Valley Christian School, in the seventh grade, the abuse occurred twice a week. This latter pattern continued when she was removed from Antelope Valley after a semester and home-schooled by Wanda, a

[1]Further statutory references are to the Penal Code.

long-time teacher. During this time, there may have been two weeks when defendant did not have intercourse with Marian, but he still touched her.

Defendant told Marian that the touching was a secret, and she was afraid to say anything because defendant said he would hurt her, her mother, or her brother. Marian believed this; once she saw respondent, in a moment of anger, throw their dog across the room and against a wall. Wanda related an incident where defendant was angry and hit her in front of Marian and Lionel, although Marian did not recall the incident. Defendant also was mean to Wanda and Lionel. He humiliated and demeaned Wanda and told Marian and her brother to address Wanda as "fat momma." Defendant was nicer to Marian than he was to Lionel.

Marian, who started menstruating when she was nine and suffered from premenstrual cramps, experienced more severe cramps when she lived in Palmdale. She generally had some bleeding after each act of intercourse. She also experienced vaginal pain. She hid her soiled underwear or rolled them up in a towel so that her mother would not see them. During this time, Wanda noticed some staining and discharge in Marian's underpants. Wanda thought the discharge was fecal matter, and believed that Marian had bowel problems. At one point Marian complained of cramps and Wanda suggested taking Marian to the doctor for a pelvic examination. Defendant vetoed the idea, telling Wanda it would be inhumane to subject a child of Marian's tender years to a pelvic exam.

In May 1995, Wanda learned that, the previous year, defendant had fathered a child out of wedlock whom he was surreptitiously supporting with community funds. Wanda and the children moved back to Texas. The divorce was finalized in May 1998. After moving back to Texas, neither Wanda nor Marian had any contact or communication with defendant.

In September 1998, when Marian was in the eleventh grade, she and Wanda got into an argument over Marian's failing grades, which had been a problem since the sixth grade. Marian blurted out, "You weren't the one who was being touched on," revealing to Wanda for the first time that defendant had sexually molested her. The police in Texas were notified, and Marian made a report of the incidents.

The People presented the testimony of Dr. Steven E. Sultan, an expert in child abuse accommodation syndrome and related experiences and behavioral traits common to child sexual abuse victims, including secrecy, a feeling of helplessness, suicidal ideation, accommodation to the abuse, and delayed disclosure. Syndrome sufferers may develop a host of problems, including depression, psychosomatic disorders involving the stomach and bowel, promiscuity, drug and alcohol abuse, and academic problems. Based on the literature and the expert's experience, acts of abuse generally progress from simple touching to more complex sexual acts, and the offender is usually a parenting party known to the child.

Dr. Sultan also noted that child abuse offenders are of two types, pedophiles and non-pedophiles. Pedophiles stalk strangers and choreograph situations to provide access to children; they rarely have sexual relationships with other adults. Non-pedophiles typically have spouses and children and occupy a parental role vis-à-vis the child. When evaluated, they do not appear to show a significant psychological disturbance and may appear to be normal, productive members of society.

In his defense, defendant maintained that he never sexually abused Marian, and that Marian and Wanda fabricated the story they presented in court. To establish his defense of fabrication, defendant presented the testimony of a psychiatrist and character witnesses, and testified in his own defense.

The defense expert, Dr. Samuel Miles, reported his findings based on a two-hour interview with defendant and his review of the police reports, medical reports, and the preliminary hearing transcript. Although he did not interview Marian or Wanda, Dr. Miles acknowledged that, in order to do a proper and thorough evaluation, he would have had to interview them. Dr. Miles opined that defendant did not meet the diagnostic criteria for pedophilia. He also stated that the physical examination of Marian conducted following her report of the abuse, which reported an intact hymen without any tear or rupture, was not consistent with Marian's claims of post-coital bleeding.

Defendant, testifying in his own behalf, denied having molested Marian in any manner. He also denied having committed any acts of violence upon Wanda, Marian or

Lionel, except for spanking the children on one or two occasions. He denied demeaning Wanda, threatening Marian, or throwing the puppy against the wall as described by Marian and Wanda. He had a good sexual relationship with Wanda and did not accord Marian any special treatment.

Defendant also presented two character witnesses who testified to his genial, nonviolent disposition.

In rebuttal, the People presented the testimony of Alicia Floyd, a friend of Wanda's from work, who reported that she had dropped by Wanda and defendant's home one day unannounced, and had observed defendant degrade and demean Lionel for no apparent reason. She felt that defendant had animosity for Wanda and the children and was not a loving husband and father.

The People also presented another expert witness, Marsha Wehr, to rebut the defense's expert testimony. Ms. Wehr was a family nurse practitioner with substantial experience in examining child sexual abuse victims. Ms. Wehr explained that physical findings of sexual abuse in children appear in up to 70 percent of cases of "estrogenized" females if an examination is conducted within 72 hours of the trauma. After that, positive findings drop to 13 percent, and no physical signs are apparent after 14 days. Ms. Wehr stated that the absence of physical findings does not mean that abuse did not occur. In fact, most examinations are normal, even with long-term vaginal intercourse. As a result, it is common in sexual abuse cases for examiners to conclude that the findings are consistent with the oral history of abuse.

At the time of her examination, Marian was 17 years old and fully estrogenized. Moreover, the exam took place over three years after the last act of abuse. Her hymen did not appear unusual for her age or inconsistent with her claims. The absence of any physical findings was not unusual under these circumstances.

After reviewing the preliminary hearing transcript, Ms. Wehr testified that Marian's claims of regular abuse and post-coital bleeding were not unusual. She noted that children sometimes mistake blood and its source.

In his argument to the jury, defendant's attorney maintained that there was a reasonable doubt that defendant had sexually abused Marian. He pointed to Dr. Miles's testimony that defendant was not a pedophile, and argued that Marian had no scarring consistent with the bleeding that allegedly occurred. The defense questioned Marian's delay in reporting the charges, and argued that Marian fabricated the charges because she was under pressure from her mother due to her poor performance in school and because she was depressed.

The jury returned a verdict of guilty on all charges. Defendant was ultimately sentenced to 70 years in prison, comprised of 16 years for count one plus nine consecutive six-year terms for counts two through ten. The court imposed and stayed six-year terms on counts 11 through 19 pursuant to section 654.

CONTENTIONS

Defendant appeals, contending that the trial court erred in failing to give a unanimity instruction, and that the evidence of force or duress was insufficient to sustain the convictions for rape in counts two through ten. Defendant also requests a correction of the abstract of judgment to conform to the judgment pronounced by the trial court.

DISCUSSION

1. *Unanimity instruction*

Defendant was charged in count 1 with continuous sexual abuse, in counts 2 through 10 with forcible rape, and in counts 11 through 19 with lewd acts with a child under 14. The continuous sexual abuse charge was based on acts occurring while Marian was in the sixth grade, when, according to her testimony, the abuse occurred once a week. The forcible rape and lewd acts charges were based upon the allegation that defendant molested Marian on or about the first of every month from July 1994 through March 1995, when she was in the seventh grade. Marian testified when she entered seventh grade, the abuse occurred twice a week. Later in the period, when Marian was home-schooled by her mother, the abuse may have occurred three to four times a week,

but not more than once a day. During this time, there may have been a two-week period when defendant did not force Marian to have sex, but the unwanted touching continued.

The court did not give CALJIC 17.01, the unanimity instruction,[2] with respect to counts 2 through 19. Defendant contends that this constitutes reversible error. He argues that the evidence "indicated more than one discrete crime occurred on or about the date charged in each of counts II through X and XI through XIX . . . and the evidence made it impossible to tell which, if any, act occurred at any given time." The contention is not well-taken.

Our Supreme Court has explained the unanimity requirement as follows: "In a criminal case, a jury verdict must be unanimous. (*People v. Collins* (1976) 17 Cal.3d 687, 693; . . .) . . . Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.) Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. (*People v. Castro* (1901) 133 Cal. 11, 13; *People v. Williams* (1901) 133 Cal. 165, 168; CALJIC No. 17.01; but see *People v. Jones* (1990) 51 Cal.3d 294.) This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense that all the jurors agree the defendant committed.' (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) For example, in *People v. Diedrich*, *supra*, 31 Cal.3d 263, the defendant was convicted of a single count of bribery, but the evidence showed two discrete bribes. We found the absence of a unanimity instruction reversible error because

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[2]CALJIC 17.01 provides: "The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

without it, some of the jurors may have believed the defendant guilty of one of the acts of bribery while other jurors believed him guilty of the other, resulting in no unanimous verdict that he was guilty of any specific bribe. (*Id*. at pp. 280-283.) 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.)" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Where there is no danger that the jury might convict the defendant of the charged offense without agreeing on the criminal act committed, there is no need for the unanimity instruction. Thus, for example, in *People v. Riel* (2000) 22 Cal.4th 1153, during prosecution of a single charge of robbery, evidenced was presented concerning two discrete crimes. The Supreme Court nevertheless found no error in failing to give CALJIC No. 17.01: "Even assuming that two distinct robberies occurred rather than one continuous robbery, 'there was no evidence here from which the jury could have found defendant was guilty of' the robbery in the car but not the earlier one. [Citation.] There was no danger some jurors would find defendant committed the . . . Truck Stop robbery but not the one in the car, while others would find he committed the robbery in the car but not the earlier one." (*Id*. at p. 1199.) The Court found telling the fact that "[T]he parties never distinguished between the two acts. The defense was the same as to both: defendant . . . did not participate in any act of robbery. By contrast, in *People v. Diedrich*, *supra*, 31 Cal.3d 263, which found prejudicial error in not requiring unanimity, the facts showed two distinct acts of bribery to which the defendant offered different defenses: a 'simple denial' of one act and an 'expla[nation]' . . . of the other. (*Id*. at p. 283.) Accordingly, the *Diedrich* jury could have divided on which bribery he committed, with the result that there was no unanimous verdict as to any act. There was no such possibility here." (*People v. Riel*, *supra*, 22 Cal.4th at p. 1199.) *People v. Perryman* (1987) 188 Cal.App.3d 1546, 1550 ["'where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably

believe all acts took place, the instruction is not necessary to the jury's understanding of the case'"] and *People v. Schultz* (1987) 192 Cal.App.3d 535, 539 ["It is well established that a trial court is not obligated to give an instruction if the evidence presented at trial is such as to preclude a reasonable jury from finding the instruction applicable"] are in accord.

Here, defendant fails to articulate how the evidence presented at trial might lead some jurors to conclude that he was guilty of one act of molestation but not another, while other jurors may have determined that he was guilty of the second offense but not the first. The defense to all the offenses was that he did not commit any of the charged acts, and that Marian was falsely accusing him to excuse her poor performance in school. Because there was no danger that defendant would be convicted even though there was no single offense which all the jurors agreed he committed, the unanimity instructed was not warranted.

2. *Sufficiency of the evidence*

Defendant also maintains that there was insufficient evidence of either force or duress to sustain the rape convictions in counts 2 through 10.

The standard of review for a sufficiency of the evidence claim is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

"'Duress' has been defined as 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citation.] As this court recognized in *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, duress involves psychological coercion. (*Id*. at p. 238.) Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] 'Where the defendant is a family member and the

victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. (*People v. Superior Court* (*Kneip*)*, supra*, 210 Cal.App.3d at p. 239.)" (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.)

Marian testified that although she never said "no" to defendant's advances, she was "too scared" to reject him, because her "family would be hurt." She testified as follows:

Prosecutor: "Did [defendant] ever . . . during this period of time . . . in Palmdale . . . ever make any . . . threats . . . if you were to tell anybody?

Marian: ". . . [He] would just hurt us.

Prosecutor: "Did you believe him?

Marian: "Yeah.

Prosecutor: "[E]ver see [defendant] be violent towards any . . . of your family?

Marian: "Mom . . . ."

Marian "never agreed to have sex." Defendant told her not to tell anyone because it was a "secret." She was 12 and 13 at the time and looked to defendant as a father figure. She repeated that she never resisted "because I was too scared . . . that he would just hurt my family, my mom."

On cross-examination, Marian testified as follows:

Defense attorney: " Did he ever in any way threaten you?

Marian: "Yes . . . . I don't know if it was threatening me, he told me about my mom . . . and my brother . . . he would just hurt them.

Defense attorney: "You didn't take those as threats . . . ?

Marian: "I was scared of him."

Marian also testified that as long as she gave in to defendant's advances, she was "making sure my mom didn't get slapped . . . ."

In our view, the foregoing evidence establishes the element of duress. The victim, 12 and 13 years old at the time of the molestation, was afraid of her stepfather, who took advantage of his psychological dominance as an adult authority figure. (*People v. Sanchez* (1989) 208 Cal.App.3d 721, 747-748, criticized on other grounds in *People v. Jones*, *supra*, 51 Cal.3d 294, 311; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 154, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 1015, 1027-1028.) Moreover, defendant specifically threatened to harm Marian's mother and brother if Marian revealed their "secret." This qualifies as duress.

3. *Abstract of Judgment*

Defendant contends, and the People agree, that the abstract of judgment needs to be amended to conform to proof and to the trial court's oral pronouncement.

Counts 6 through 10 of the amended information charged defendant with rape in violation of section 261, subdivision (a)(2). The verdict forms indicate that these counts were for rape. At some point, the record starts to identify counts 6 through 10 as violations of section 288, subdivision (b)(1), forcible lewd acts. The jury was not presented with these allegations, nor did it render a guilty verdict as to them. Thus, both parties agree that the abstract of judgment should be corrected to reflect that, in counts 6 through 10, defendant was convicted of violating section 261, subdivision (a)(2), not section 288, subdivision (b)(1).

4. *Blakely issue*

Appellant contends that the trial court's imposition of the upper term for the continuous sexual abuse count and of consecutive sentences for the counts 2 through 9 rape convictions deprived him of his federal constitutional rights to a jury trial and to due process of law. We do not agree.

Well before appellant's sentencing hearing, the United States Supreme Court held that when proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Fifth

and Sixth Amendments require to be proven to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Ibid*.)

Following *Apprendi*, the United States Supreme Court decided *Blakely* v. *Washington* (2004) 524 U.S. ____ [124 S.Ct. 2531]. In *Blakely*, the Court explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] and the judge exceeds his proper authority." (*Id*. at p. ___ [124 S.Ct. at p. 2537].)

Unlike the defendant in *Blakely* v. *Washington* (2004) 524 U.S. ____ [124 S.Ct. 2531], appellant did not object that the upper term or consecutive sentences constituted *Apprendi* error. (*Id*. at p. 2535.) Thus, appellant has forfeited his *Apprendi* claim, and related *Blakely* claim. (See *United States* v. *Cotton* (2002) 535 U.S. 625 [finding that defendant forfeited his *Apprendi* claim by failing to object during trial even though *Apprendi* was not decided until defendant's case was on appeal].)

Moreover, even if the claim were not waived, we would find no reversible error. Under California's determinate sentencing law, the maximum sentence a trial court may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) The court may impose the upper term only if it makes additional findings of circumstances in aggravation. (*Ibid*.) Under *Blakely*, unless those circumstances are based on facts reflected in the jury verdict, imposition of the upper term violates the defendant's Sixth Amendment right to a jury trial, and the sentence is invalid. (*Blakely* v. *Washington*, *supra*, 524 U.S. at p. ___ [124 S.Ct. at p. 2538].)

Here, the trial court gave the following explanation of its decision to impose the upper term for count 1, continuous sexual abuse: "[T]he court finds the following factors in aggravation. Number 1, the nature of the crime where as a 288.5 can be committed by as little as three acts of substantial sexual conduct over three months these crimes that occurred between the months were numerous way beyond what would be required for a 288.5. Further, the defendant took . . . advantage of a position of trust . . . in that he was the stepfather who was trusted with the victim in this case. Thirdly, the victim was particularly vulnerable in that he sought her out when there were no others around to come to her aid or to protect her from the defendant. Also, there are numerous crimes. The way the prosecutor charged this case he could have charged literally hundreds of crimes in this case but yet chose to only allege 19, some of which are duplicative. So that is a further aggravating factor. The defendant could have been convicted of many more counts that were not even charged."

Although the foregoing findings are not specifically reflected in the jury's verdict, it is undisputed that appellant is Marian's stepfather and thus held a position of trust, and that the offenses occurred when Marian was 12 and 13 years old and was, as a child on the cusp of adolescent, particularly vulnerable. We thus see no possibility that appellant would receive a more favorable sentence if this matter were remanded for a new sentencing hearing. (See *People* v. *Price* (1991) 1 Cal.4th 324, 492 [when a trial court has given both proper and improper reasons for a sentencing choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chose a lesser sentence had it known that some of its reasons were improper]; *Chapman* v. *California* (1967) 386 U.S. 18.)

We see no federal constitutional violation in the imposition of consecutive sentences. The trial court here ruled that consecutive sentences were required by section 667.6, subdivision (d) on the grounds that the offenses occurred on separate occasions. The verdict on each of counts 2 through 9 included the jury's finding, beyond a reasonable doubt, that appellant committed the crime of rape on specific dates, that is, separate occasions. This fully complies with the Sixth Amendment jury trial and

Fourteenth Amendment due process clause rights. Moreover, in this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely v. Washington* (2004) 524 U.S. at p. ___ [124 S.Ct. at p. 2540].)

DISPOSITION

The judgment is affirmed. The abstract of judgment is ordered corrected to reflect that, in counts 6 through 10, defendant was convicted of violating section 261, subdivision (a)(2), not section 288, subdivision (b)(1) and, as corrected, forwarded to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P.J.

GRIGNON, J.